

Executive Summary
Position and Guidance Regard FCC TRO Rulemaking

by
Michigan-Based CLEC Coalition
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1. Introduction

Presented is a discussion document regarding the position and guidance offered by the Michigan-Based CLEC Coalition (MBCC) pertaining to the FCC's TRO Rulemaking. It is the intention of the Coalition to submit these comments in a formal filing. This guidance and subsequent filing is in response to the FCC's request for same.

"39. In this Notice we seek comments on how to develop legally sustainable rules for access to unbundled network elements. We seek comments, for instance, on how to best define markets, including product markets and customer class. We also wish to solicit comment on the economic effect that various UNE approaches might have on small entity telecommunications providers.'

1.1 Who we are

We are small, yet vital, entity telecommunication providers. The Michigan Coalition is comprised of ten (10) entrepreneurial Michigan-based CLECs: specifically, ACD Telecom, Affinity, CMC, GRID4, JAS Networks, LDMI, QuickConnect, Superior Spectrum, TC3 Telecom, and TelNet Worldwide. Together and individually, we represent and provide a direct and unique factual basis as to the impact regulatory policy at the federal and state levels have on the value proposition we provide to the market and the viability of our enterprises.

1.2 Controlling statutory provisions

This comments and guidance draw from fundamental statutory precepts.

"[a]n Act [t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.¹"

The Act contemplated three methods for new entrants to enter a/the local exchange market; (1) by building their own networks, such a cable TV system for dual use, (2) by building various facilities and using elements of the incumbent LECs network for the ones the new entrants lacked themselves, and (3) by reselling the incumbent LECs services.

The commission has also recognized that the Act imposes the following duty upon incumbent LECs:

To "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable , and nondiscriminatory in accordance with the terms and conditions of he agreement and the requirements of this section and section 252." Section 9, TRO.

¹ Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

In section 10 of the TRO the Commission acknowledged that section 251 (d)(2) of the Act provides that

“in determining what network elements should be made available for purposes of subsection (C)(3), the Commission shall consider, at a minimum, whether – (A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.”

2. Impairment

Since the inception of the Act, the climate for CLECs in general and small entity CLECs in particular has been confronted with Herculean obstacles of the incumbent LECs and a maddening shifting regulatory landscape. Yet despite these unnatural and added challenges, the CLEC business has been met with great passion and desire by the public because of the fundamental right [desire?] for choice, value, and quality.

The latest tax on the vital resource of competitive choice is the drastic change in the concept of impairment². As exemplified by the composition of the Michigan-Based CLEC Coalition, business plans are unique and diverse - the beauty of our free market system.

Each member CLEC services its clients within the framework granted and prescribed by the Act. In executing any business plan, access to natural, financial, and human resources is of keen study. In wireline telecommunications, the need for unimpaired (financially and operationally) access to infrastructural resources is direct and tantamount.

At this juncture, incumbent LECs regretfully do not relish the bounty CLECs present to advance them and the industry. Moreover, it is understood that access to infrastructural resources of the LECs can be foreclosed by a showing of non-impairment. Accordingly, presented below are concepts and strategies for migration rulemaking that embrace the pragmatics of market economics and the legal precepts of the Act.

Theorem 1. Law of Interdependence. In invoking any rulemaking, we site the first law of telecommunication. Telecommunications is defined here as communication at a distance. Telecommunications requires a set of interdependent elements including links (e.g. loops), nodes (e.g. switches), protocols (e.g. SS7), and applications (e.g. dial tone/voice service). Lack of access to any one of these requisite elements by rule, operation, or cost renders the entire system useless.

Postulate. Any one of the requisite telecommunications elements by itself is useless.

² It is noted that impairment is a poor choice of terminology. Rather enable or not-enable should be used in reference to CLEC access to LEC infrastructure. This comes from basic tenets of 'innocent until proven guilty' and judgment ruling of 'guilty and not-guilty'. Our enlighten society uses these principles to bias decisions to protect the party which stands to suffer the greatest harm - a probabilistic benefit-of-the-doubt. We submit that the CLEC industry in general and the greater public good in particular stand out as the parties with the most to suffer if incorrect judgments are contrived in the commission's rulemaking.

Theorem 2. The Telecommunications Market is Interdependent. Market opportunity is predicated on a requisite confluence of services amongst geographically dispersed locations.

The corollary of these theorems is that the system can be easily booby-trapped.

- Prematurely declare any one UNE unimpaired and the whole system fails.
- Incent investment in elements (e.g. switches) without assurance of access to remaining request elements (e.g. loops) results in stranded investment.
- Truncate the ubiquity of an offering, forecloses markets and capital.

As the dominate rival AND vendor for requisite elements, the incumbent LECs understand these concepts very well. Declare UNE-Switching unimpaired; UNE-P is displaced and competitors must exit the market due to excessive monetary barriers to entry. Eliminate inter-office transport and those providers who invested in switching now are faced with stranded equipment and possibly stranded collocated sites. Fail to understand that telecommunications is communications at a distance, and a truncated market results. Together these conditions are in direct conflict with the construction of infrastructure, competitive offerings, and investment of which was supposed to be the bedrock purpose of the Act.

The FTA created rights, and the FCC has the duty to insure that the “unholy” rival/vendor conundrum of the incumbent LEC is not used as ruse to establish an unregulated monopoly and fleece the property and investment made by CLECs and the consumers they serve.

2.1 Thresholds: The key to a healthy business plan, industry, and rulemaking

Figure 1: Economic Utility

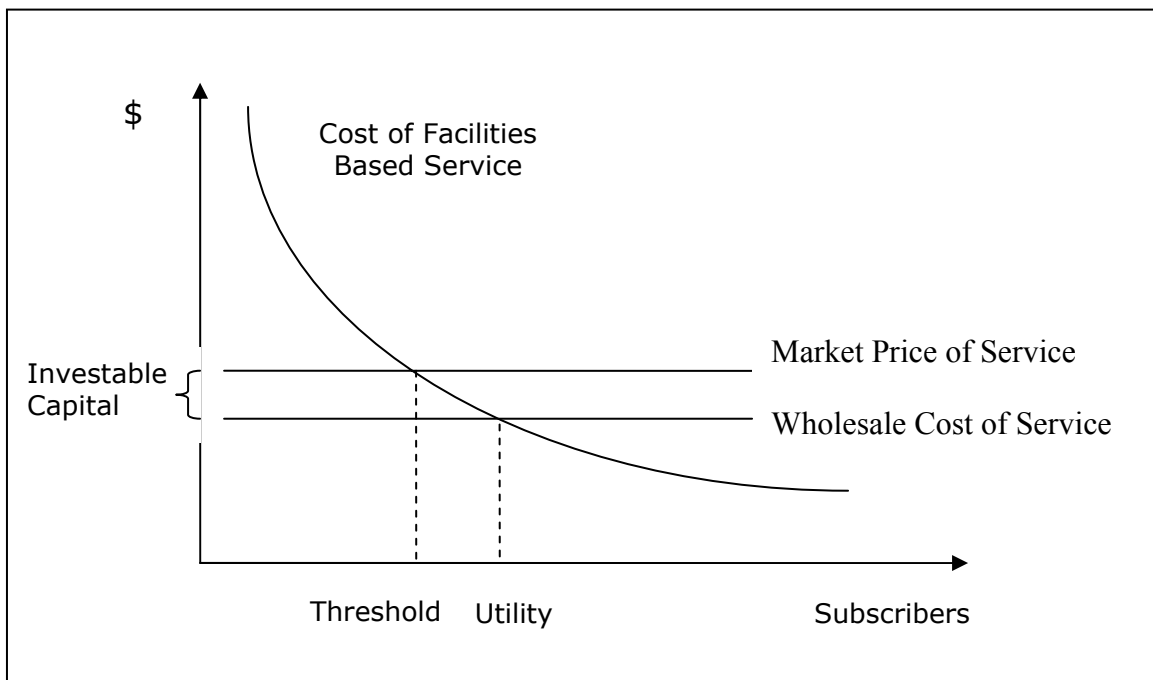


Figure 1 depicts a basic economic principle of utility. The cost curve for a facility-based systems decreases with an increase in the number subscribers. Moreover, we see from this figure that the cost for facilities-based services is virtually infinite at

low numbers of subscribers. Intersecting the cost curve is the fair market price for the service which is independent of the number of subscribers. The point intersection between the fair market value and the facility-based cost curve represents a threshold condition wherein a breakeven condition arises for the CLEC and a point to commence migration [to facility-based services?].

The factors that drive the cost per subscriber down include:

- Economies of scale. For example, in the case of switching equipment, the number of switch ports in a system frame is defined as density. The ability to procure highly dense switching systems lowers the cost per port.
- Over-subscription. Oversubscription is a common goal of service providers. The concept is simple, the probability of simultaneous demand for a shared resource decrease with increased subscriber base. This is why one experiences busy signals on Mother's Day, because the oversubscription assumption is breached.
- Useful Life. Most often an element has a useful life past the amortization of the element. Incremental costs to support become quite low. This is the case for elements like loops.
- Technology. Innovation continually ushers in new technology which lowers the cost of a capability (acquisition and ownership cost).
- Competition. A rich and diverse vendor market insures that any element is being driven towards maximum efficiency and quality.

These observations provide an understanding of the factors that drive down costs and an understanding of which of these factors are in the control of the CLEC and which are not. For example, represented in figure 1 is the wholesale cost of the service which is, once again, independent of the number of subscribers. Once the level of subscribership exceeds this number, the utility of a wholesale solution is eclipsed.

Observing this condition:

- 1) if wholesale cost nears or exceeds the fair market price, capital margin for investment vanishes as well as the sustainability of the business model. This is a mode of attack by the incumbent LEC to drive out competition.
- 2) If the costs for the request elements increases, the facility-based cost curve shifts to the right, thereby increasing the threshold condition for breakeven.

The upshot of this condition is by working to lower the cost of requisite elements accelerates the opportunity to divest from a dependency on incumbent LEC elements. Working to this end, CLECs have choices today for various elements such as switches and continually strive to keep all of its costs down. However, the sole-source nature of incumbent LEC elements is outside of CLEC control and can artificially subvert this goal unless protected by realistic state-approved cost-based pricing – as provided for by the Act.

2.2 Proposed Thresholds

The concept of thresholds is omnipotent in that it exemplifies basic economic decision making that takes place in every business, does not discriminate, within the province of the Act and FCC, and provides a structured and sensible migration to alternative sources of requisite elements.

2.2.1 Facility Thresholds

CLECs should be deemed capable of installing and maintaining their own facilities for:

- (a) Local Switching when its line density in any LATA exceeds the number of 10,000 combined residential and business lines (DS0 equivalents).
- (b) Collocation Facilities: CLECs should be deemed capable of building, sharing or otherwise acquiring collocation facilities in any wire center in any LATA with such line count, when the number of residential and business lines reaches a qualifying count of 500 in any wire center. When that threshold is met, the CLEC should no longer have access to the incumbent Leek's UNE-P or EEL network element in such qualifying wire center.

2.2.2 Wholesale Thresholds

In lieu of reaching a facilities threshold:

- (a) ILEC provisioning of EEL circuits or UNE-P should not be required if there exists 2 wholesale providers (other than the ILEC) providing the same functionality within any given CO in a LATA.
- (b) ILEC provisioning of Interoffice Transport, including dark-fiber should not be required if there exists 2 wholesale providers (other than the ILEC) providing the same functionality between any 2 CO's

2.2.3 Aggregate Thresholds

- (a) If the lines operated by all CLECs, by any means, exceeds 40% of the deployed lines (DS0 equivalents) in a given CO, ILEC provisioning of UNE-P and EEL elements should not be required.
- (b) If the lines operated by all CLECs, by any means, exceeds 40% of the deployed lines (DS0 equivalents) in a given LATA, ILEC provisioning of only UNE-L elements should be required.

2.2.4 UNE-L

CLECs should have access to UNE-L without prejudice:

- (a) Access to the full functionality of existing metallic, fiber and hybrid loops migrated to competitive switching or other facilities.
- (b) The incumbent LEC should permit CLECs to provide voice service using the same line used by the incumbent LEC to provide DSL services and should not discriminate in the terms and conditions on which DSL services are provided to customers of CLEC voice services.
- (c) There should be no prohibitions or limitations on the use of alternative technologies or facilities, whether they are standalone incumbent LEC loops or non- incumbent LEC facilities.
- (d) Line-sharing should be allowed with the proviso that the cost for the loops is to be shared equally between the voice and data service providers.

3. Counter Points

Presented below are responses to commonly cited issues by all stakeholder of the FTA.

- Would the MBCC's proposed thresholds withstand Federal Court scrutiny?

Yes. Generally speaking, a major criticism of the Federal Court has been that the FCC's definitions of impairment have suffered from vagueness. Adoption of the Michigan-Based CLEC Coalition's proposal would set clear, definite, objective standards.

- Are the MBCC's proposed thresholds consistent with the FCC's most recent definition of impairment?

Yes. The FCC's most recent definition of impairment focused on the concept of "barriers to entry." The MBCC's proposed thresholds would clearly and objectively define when such barriers to entry are overcome - without discrimination.

- Do MBCC's proposed thresholds address Chairman Powell's concern regarding the need to transition towards facility-based competition?

Yes. The proposed thresholds provide criteria that objectively define last point at which CLECs would be able to lease facilities from ILECs.

- Would MBCC's proposed thresholds advance the goals of the Federal Act?

Yes. The greatest impairment that CLECs face is uncertainty. By setting clear, objective standards, CLECs could devise rational business models, obtain capital, avoid incessant litigation, and contribute toward the advancement of a sophisticated, high quality telecommunications infrastructure to the betterment of our society.

4. Conclusion

The concepts, facts, and solutions presented here are directed to inure the fountainhead of the FTA, the betterment of telecommunications services for the American consumer through a competitive landscape of every shape and size.

The Michigan-Based CLEC Coalition asserts that the FTA provides us with clear rights.

1) The right to interconnect facilities and equipment with the ILEC's network. Section 251(c)(2).

2) The right to interconnection that is in quality to the services that the ILEC provides to itself and its affiliates. Section 251(c)(2)(C).

3) The right to interconnect on rates, terms, and conditions that are just and reasonable and nondiscriminatory. Section 251(c)(2)(D)

4) The right to nondiscriminatory access to network elements on an unbundled basis at any technically feasible point that are essential to enable requesting CLECs to provide the services they seek to offer. Section 251(c)(3) and Section 251(d)(2)(B).

5) The right to preservation of state law that is consistent with the Federal Act and does not substantially prevent implementation of the purposes of the Act. Section 251(d)(3).

It is to these rights which we acted on in reliance of and in good faith. We fully expect the FCC to execute its duties in upholding these rights and to the beneficiaries we both serve – the American consumer.

All CLECs are important. Small to mid size carriers and business like MBCC have a vital role in the fabric of the American economy. It is this segment that is the incubator of new jobs and the crucible of innovation. These entities face unique challenges and deserve vehicles and unfettered avenues to propagate their benefits.

The concept of thresholds presented here is omnipotent in that it exemplifies basic economic decision making process that takes place in every business. It does not discriminate, it is within the province of the Act and FCC, will withstand the scrutiny of the courts, and provides a structured and sensible migration to alternative sources of requisite elements. We call upon the FCC to take full measure of the solutions offer here and integrate them within forthcoming rulemaking.

Small businesses are growth generators. Small CLECs are innovators and are able to quickly devise specific solutions to specific customers needs. Having numerous small CLECs enable numerous unique problems to solved simultaneously. Each CLEC can fill a specific need and niche. A Gigantic telecommunications provider, of any modality, cannot respond as quickly as small providers or simultaneously offer numerous solutions to numerous unique problems. Gigantic telecommunications providers are factories, dependent on established systems to provide cookie cutter responses to problems. Their nature is not to be innovators. The public and our economy cannot and does not want to return to a world where dinosaurs ruled.